(2)

Supreme Court, U.S.
FILED
OCT 29 1991
OFFICE OF THE CLERK

No. 91-543
SUPREME COURT
OF THE UNITED STATES
October Term, 1991

THE STATE OF NEW YORK,

Petitioner,

v

THE UNITED STATES OF AMERICA, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF PETITIONER

FRANK J. KELLEY
Attorney General
State of Michigan

GAY SECOR HARDY
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

A. MICHAEL LEFFLER
CHARLES SCHETTLER, JR.
Assistant Attorneys General

Attorneys for Amicus
State of Michigan

QUESTIONS PRESENTED

I

WHETHER STATE SOVEREIGNTY PROHIBITS CONGRESS FROM ENACTING A STATUTE UNDER THE COMMERCE CLAUSE WHICH IS DIRECTED EXCLUSIVELY AT THE STATES AND WHICH MANDATES THAT THE STATES ASSUME RESPONSIBILITIES AND TAKE ACTIONS WHICH REQUIRE THE STATES TO EXERCISE THEIR EXECUTIVE OR LEGISLATIVE POWERS.

II

WHETHER A CONGRESSIONAL STATUTE WHICH REQUIRES A STATE TO EXERCISE ITS EXECUTIVE OR LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS A STATE IN THE EXERCISE OF THOSE POWERS FROM BEING RESPONSIVE TO THE MAJORITARIAN WILL OF ITS CITIZENS.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF THE STATE OF MICHIGAN 1

SUMMARY OF ARGUMENT 6

ARGUMENT:

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW ON WHETHER STATE SOVEREIGNTY PROHIBITS CONGRESS FROM ENACTING A STATUTE UNDER THE COMMERCE CLAUSE WHICH IS DIRECTED EXCLUSIVELY AT THE STATES AND WHICH MANDATES THAT THE STATES ASSUME RESPONSIBILITIES AND TAKE ACTIONS WHICH REQUIRE THE STATES TO EXERCISE THEIR EXECUTIVE AND LEGISLATIVE POWERS 11

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW ON WHETHER A CONGRESSIONAL STATUTE WHICH REQUIRES A STATE TO EXERCISE ITS EXECUTIVE AND LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS A STATE IN THE EXERCISE OF THOSE POWERS FROM BEING RESPONSIVE TO THE MAJORITARIAN WILL OF ITS CITIZENS 19

Page

III. THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW CONCERNING THE EXTENT TO WHICH GARCIA FORECLOSES COURTS FROM CONDUCTING AN INDEPENDENT DETERMINATION OF THE CONSTITUTIONALITY OF A STATUTE CHALLENGED ON FEDERALISM GROUNDS IN LIGHT OF THE PRINCIPLE OF JUDICIAL REVIEW ESTABLISHED IN THE LANDMARK CASE OF MARBURY v MADISON 24

CONCLUSION 27

TABLE OF AUTHORITIES

Pages

CASES

FERC v Mississippi,
456 US 742 (1982) 13

Garcia v San Antonio Metropolitan
Transit Authority,
469 US 528 (1985) 10,15,25,26

Marbury v Madison,
1 Cranch 137 (1803) 10,11,24,26

National League of Cities v Usery,
426 US 833 (1976) 15

Nevada v Skinner, 884 F2d 445
(9th Cir, 1989) cert denied,
110 S Ct 1112 (1990) 12,13

South Carolina v Baker,
485 US 505 (1989) 16,17,18

State of Michigan, et al v
United States of America, et al,
USDC (WD MICH) Case No.
5:90-CV-27 5,6

STATUTES

42 USC § 2021b-2021j .....passim

42 USC § 2021c(a)(1) 3

42 USC § 2021e(d)(2)(c) 14

42 USC § 2021e(e)(1)(c) 3

26 USCS § 103, Tax Equity and
Fiscal Responsibility Act
of 1982, § 310 16,17

Pages

CONSTITUTION

US Const, art IV, § 4 1,6,20

MISCELLANEOUS

Chandler, Enslen and Renstrom, The
Constitutional Law Dictionary,
Volume 1, p 56 (1985) 20

Merritt, The Guarantee Clause And
State Autonomy: Federalism for a
Third Century, 88 Columbia Law
Review 1 (1988) 22

Tribe, American Constitutional Law
(2nd Ed), §§ 3-2, pp 23-26 (1988)... 25

INTEREST OF THE STATE OF MICHIGAN

The decision in this case of the United States Court of Appeals for the Second Circuit presents important questions of federal constitutional law pertaining to federalism which have not been, but which should be, settled by this Court.

Petitioners are challenging the constitutionality of the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 USC §§ 2021b-2021j (1985 Act) on state sovereignty grounds which have their basis in the Tenth Amendment of the United States Constitution and the Guarantee Clause found in art IV, § 4 of the United States Constitution. The State of Michigan files this amicus brief as a state whose sovereignty is violated by the 1985 Act.

The 1985 Act imposes an absolute duty on the states to provide for the disposal of low level radioactive waste (LLRW) covered by the statute. No provision is set forth in the 1985 Act which allows a state to decline to accept the responsibility of providing for the disposal of LLRW. Further, the vast majority of this LLRW is generated and owned by private proprietary entities.

The 1985 Act is a statute aimed exclusively at the states, mandating that they carry out and implement a federal policy for LLRW disposal. This mandate inevitably requires states to exercise their legislative and executive powers in order to comply with their disposal responsibility for all LLRW generated within the respective states.

42 USC § 2021c(a)(1) of the 1985 Act provides, in pertinent part:

> Each state shall be responsible for providing, either by itself or in cooperation with other states, for the disposal of -
>
> (A) Low level radioactive waste generated within the state ....

In addition to this heavy burden with its accompanying requirements, there are specific requirements within the 1985 Act requiring the exercise of state executive or legislative powers, or both. As an example, 42 USC § 2021e(e)(1)(C) requires a state to file a complex LLRW disposal application with the Nuclear Regulatory Commission (NRC) or, in the alternative, requires the State's Governor to provide a written certification to the NRC that actions have been taken to ensure disposal capacity for all the applicable

LLRW generated within the state after December 31, 1992.

The manner in which states exercise their legislative and executive powers may differ because of the unique circumstances and laws within each state and the manner in which a state chooses to comply with the 1985 Act. There are various options: LLRW compact membership, acting alone and building an LLRW disposal facility, or contracting with another state or compact for LLRW disposal. However, all of these options inevitably require the exercise of a state's legislative or executive powers or both, to carry out the LLRW disposal responsibility.

With respect to the State of Michigan, some of the executive and legislative actions taken were as follows.

1. Entering into the Midwest Interstate Low Level Radioactive Waste Compact through the passage of legislation, 1982 PA 460.

2. The passage of legislation, 1987 PA 204, creating a Low Level Radioactive Waste Authority to carry out the state's responsibilities to provide for the disposal of LLRW.

3. The passage of legislation, 1987 PA 203, to provide for Michigan Department of Public Health oversight over the siting of a low level radioactive waste disposal facility.

4. The appointment of a Low Level Radioactive Waste Authority Director and a Commissioner to the Midwest Interstate Low Level Radioactive Waste Compact.

5. The amendment of a state statute, 1987 PA 113 in order to allow for the previously prohibited disposal of LLRW in Michigan.

The State of Michigan is challenging the constitutionality of the 1985 Act on State Sovereignty and Guarantee Clause grounds in State of Michigan, et al v

United States of America, et al, U.S. District Court, WD of Michigan, Case No. 5:90-CV-27. The State of Michigan is currently appealing the dismissal of this case to the U.S. Court of Appeals for the Sixth Circuit. The Midwest Interstate Low Level Radioactive Waste Commission voted to revoke the State of Michigan's membership in the compact on July 24, 1991.

SUMMARY OF ARGUMENT

In this case, Petitioner is challenging the constitutionality of the 1985 Act on state sovereignty grounds which have their basis in the Tenth Amendment to the United States Constitution and the Guarantee Clause found in art IV, § 4 of the United States Constitution.

In filing this amicus brief, the State of Michigan concedes that Congress can persuade or pressure the states to do or refrain from doing something even when such pressure is onerous. It is well-established that Congress can use the carrot and the stick approach in getting states to do what it wishes. But, in the previous cases heard by this Court, the state had the option of not doing what Congress wanted if they were willing to forego the benefit or suffer the consequences (such as a loss of federal funding or abandoning a regulatory field where they had a vital interest).

The essential difference about the 1985 Act, which is being challenged in this lawsuit, is that it mandates the states' responsibility for the disposal

of LLRW generated by private and federal generators within its borders. Unlike other congressional enactments, a state cannot escape the responsibility for LLRW disposal by suffering certain consequences, however onerous they may be. This mandatory imposition of responsibility for LLRW disposal, forces Michigan to employ its legislative and executive powers to carry out federal policy.

This brief argues that the 1985 Act, as a statute directed exclusively at the states which mandates the states assume responsibilities and take actions which require the states to exercise their executive and legislative powers, presents an important question of federal constitutional law on the extent to which state sovereignty limits the ability of

Congress, under the Commerce Clause, to enact such a statute.

Further, this brief argues that by forcing states to employ their legislative and executive powers to carry out the LLRW disposal responsibility imposed upon the states, the 1985 Act prevents the states from being responsive to the majoritarian will of its citizens. It is argued that this raises an important federal constitutional question as to whether the 1985 Act, in not allowing state governments to be responsive to the majoritarian will of its citizens on the issue of LLRW disposal, effects a denial of a republican form of government on that issue in contravention of the Guarantee Clause of the United States Constitution.

Finally, this brief argues that the reading of Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 (1985), urged by Defendants and adopted by the lower courts in this case, results in undue deference to the judgment of Congress in passing the legislation that fails to give appropriate consideration to the Tenth Amendment and Guarantee Clause concerns of the states and in effect forecloses the judiciary from conducting an independent determination of the constitutionality of the 1985 Act. It is argued that such a reading is not consistent with the principle of judicial review established in the landmark case of Marbury v Madison, 1 Cranch 137 (1803), and that, therefore, this case raises the important federal question as to the extent to which the Garcia case

prevents courts from exercising judicial review over the constitutionality of a statute challenged on federalism grounds in light of the principle of judicial review established in the landmark case of Marbury v Madison.

ARGUMENT

I

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW ON WHETHER STATE SOVEREIGNTY PROHIBITS CONGRESS FROM ENACTING A STATUTE UNDER THE COMMERCE CLAUSE WHICH IS DIRECTED EXCLUSIVELY AT THE STATES AND WHICH MANDATES THAT THE STATES ASSUME RESPONSIBILITIES AND TAKE ACTIONS WHICH REQUIRE THE STATES TO EXERCISE THEIR EXECUTIVE AND LEGISLATIVE POWERS.

The issue presented in this case is unique. It presents the first case involving a congressional statute, aimed exclusively at the states, which mandates that a state exercise its executive and

legislative powers. Most of the previous cases reaching this Court, which presented the issue of whether Congress, under the Commerce Clause, could "require" states to take certain actions, have been of the carrot and the stick variety. If states were willing to forego federal benefits, i.e., a loss of federal funds, or if states were willing to suffer "federal sanctions", i.e., abandoning a regulatory area in which they have a vital interest, the state could escape having to carry out the will of Congress.

A classic example of Congress using the carrot and stick approach was presented in a case in which this Court denied certiorari. In Nevada v Skinner, 884 F2d 445 (9th Cir, 1989) cert denied,

110 S Ct 1112 (1990), Congress, through legislation, threatened the withholding of 95% of Nevada's federal highway funds if Nevada did not enact a 55 mile per hour speed limit. In other cases presented to this Court, states have been faced with complying with congressional standards or abandoning a regulatory field in which a state has an overriding interest. See FERC v Mississippi, 456 US 742 (1982).

In the legislation at issue in these previous cases, though the price may be high, the state's freedom to employ or not to employ their legislative and executive powers to carry out the will of Congress was left intact. That is not true under the 1985 Act. In this act, Congress has mandated that states must

provide for the disposal of all LLRW generated within the state except for certain exempt federally generated LLRW.

This unprecedented intrusion on state sovereignty is exacerbated by the taking title and liability provision found in § 2021e(d)(2)(c) of the 1985 Act. By requiring that if states are unable to provide for the disposal of LLRW by January 1, 1996, they must accept from private and federal generators of LLRW, title of the LLRW and liability for all damages directly or indirectly related to the LLRW, this provision appropriates by federal edict a state's credit and puts its treasury at risk to cover a liability which would under the law normally be that of the private proprietary and federal generators of the hazardous LLRW.

In the other federalism cases considered by this Court, the states were merely being required to comply with the law of the land, like everyone else. Both National League of Cities v Usery, 426 US 833 (1976), and Garcia v San Antonio Metropolitan Transit Authority, 469 US 528 (1985), involved the application of the overtime and minimum wage requirements of the Fair Labor Standards Act (FLSA) to the states. The FLSA is a statute that applies to employers in the private sector as well as employers in the state government sector. The FLSA was not directed exclusively at the states. Thus, the broad issue in Usery and Garcia was whether what is the law of the land for everyone else would apply to the states.

> SAMTA [the state agency] faces nothing more than the same minimum wage

> and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet. Garcia, 469 US at 555.

But in the instant case, the responsibility to provide for LLRW disposal in the 1985 Act is directed exclusively at the states. This Court has never held that a congressional statute directed exclusively at the states may commandeer the states' legislative and executive powers.

In South Carolina v Baker, 485 US 505 (1989), there was a challenge to § 310 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) which removed a federal income tax exemption for bonds issued by states and local governments unless those bonds are issued in registered form. This meant that for states to continue to offer lower interest rates

and remain competitive in the bond market, they would have to issue registered bonds. The removal of the income tax exemption was part of a statutory program to eliminate tax evasion. Section "310 ... covers not only state bonds but also bonds issued by the United States and private corporations." Baker, 485 US at 510. Thus, unlike the 1985 Act, TEFRA was not directed exclusively at the states. In finding § 310 constitutional, this Court stated:

> Because, by hypothesis, section 310 effectively prohibits issuing unregistered bonds, it presents the very situation FERC [v Mississippi, 456 US 742 (1982)] distinguished from a commandeering of state regulatory machinery: the extent to which the Tenth Amendment 'shields' the states from generally applicable federal regulations. (citations omitted). Baker, 485 US at 514 (Emphasis added)

Thus, in Baker, the Supreme Court found that there was not a commandeering of

state powers. It is true that in Baker there is some language which suggests that some commandeering of state powers is permissible. However, the permissible commandeering of state powers is limited to situations in which a state has chosen to engage in a federally regulated activity.

> Such 'commandeering' is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity, is a commonplace that presents no constitutional defect. Baker, 485 US at 514-515 (Emphasis added)

Under the 1985 Act, however, states are not given a choice of engaging or not engaging in a federally regulated activity. The 1985 Act and its mandate that

states must provide for LLRW disposal, is not limited to states which have voluntarily chosen to get involved in LLRW disposal.

II

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW ON WHETHER A CONGRESSIONAL STATUTE WHICH REQUIRES A STATE TO EXERCISE ITS EXECUTIVE AND LEGISLATIVE POWERS VIOLATES THE GUARANTEE CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE IT PREVENTS A STATE IN THE EXERCISE OF THOSE POWERS FROM BEING RESPONSIVE TO THE MAJORITARIAN WILL OF ITS CITIZENS.

The 1985 Act's mandate that all states provide for the disposal of low level radioactive waste, with its concomitant compelled exercise of legislative and executive powers in order to carry out that mandate, raises serious concerns about denying a republican form of government on the issue of the disposal of LLRW by state governments.

US Const, art IV, § 4, provides in pertinent part:

> The United States shall guarantee to every state in this union a republican form of government.

Chandler, Enslen and Renstrom, The Constitutional Law Dictionary, Volume 1, p 56 (1985), defines republicanism as:

> The doctrine of government by the people through majority rule ....

Thus, the essence of a republican form of government is one in which the citizens control their rulers and pass their own laws through the majoritarian process.

In Michigan, there has been a great deal of controversy concerning the disposal of LLRW. A large number of Michigan's citizens have made it clear that they do not want to see state government take responsibility for the disposal of LLRW within the state.

The 1985 Act, by forcing Michigan to implement federal policy regarding LLRW disposal, expend state monies, and be accountable to the federal government in the exercise of its legislative and executive powers to provide for the required LLRW disposal, rather than be accountable to the citizens of the state, through the majoritarian process, raises the following issue: Does this effectuate a denial of a republican form of state government to the citizens of the various states when those states are dealing with the issue of LLRW disposal?

An important federal question as to the limits imposed on Congress' commerce power by the Guarantee Clause of the

United States Constitution is raised by this case. Further, Professor Deborah Jones Merritt in her accomplished article, The Guarantee Clause And State Autonomy: Federalism for a Third Century, 88 Columbia Law Review 1 (1988), has perceptively analyzed why such a question is justiciable. Professor Merritt's article establishes that while the general rule is that conventional Guarantee Clause claims are not justiciable, the courts have been willing to entertain Guarantee Clause claims brought to protect state autonomy. As Professor Merritt notes:

> [Neither] Supreme Court precedent nor considerations of policy foreclose adjudication of claims that the federal government has violated the guarantee clause by intruding upon state autonomy. Merritt, at 70 (Emphasis added)

While controversy concerning the siting and building of what is perceived as

a noxious facility is not unique to LLRW (it is conceded that hazardous waste disposal facilities and prisons engender similar reactions from the public), what is unique is the fact that because of the 1985 Act, state government in the exercise of its executive and legislative powers does not have the discretion to respond to the majoritarian will of its citizens.

New York's Guarantee Clause claim is brought to protect its state autonomy. As such, it raises an important federal question of constitutional law that is justiciable.

III

THIS CASE RAISES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW CONCERNING THE EXTENT TO WHICH GARCIA FORECLOSES COURTS FROM CONDUCTING AN INDEPENDENT DETERMINATION OF THE CONSTITUTIONALITY OF A STATUTE CHALLENGED ON FEDERALISM GROUNDS IN LIGHT OF THE PRINCIPLE OF JUDICIAL REVIEW ESTABLISHED IN THE LANDMARK CASE OF MARBURY v MADISON.

In Marbury v Madison, 1 Cranch 137, (1803), the Court held that it was the province and the duty of the judicial branch to say what the law is and said that to deny the permissibility of judicial review of the constitutionality of a congressional statute would be to say that the courts "must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions." Marbury, 1 Cranch at 178. Thus, Marbury stands for the doctrine that the courts,

not the legislature, must make the final determination whether, in a particular case, an act of Congress is in conflict with the constitution. See, Tribe, American Constitutional Law (2nd Ed), §§ 3-2, pp 23-26 (1988).

That the courts, through judicial review, are the final arbiter of the constitutionality of congressional enactments has been a basic premise of American jurisprudence for 188 years. Yet the reading of Garcia, urged by the Defendants in this case, and apparently adopted by the district court and circuit court, gives undue deference to the judgment of Congress in passing the legislation, and fails to give appropriate consideration to the Tenth Amendment and Guarantee Clause concerns of the states

and, in effect, forecloses the judiciary from conducting judicial review, through an independent determination of the constitutionality of the Commerce Clause legislation which is alleged to be in violation of state sovereignty.

While certainly this Court in Garcia, indicated that the political process is "... the principal and basic limit on the federal commerce power ..." Garcia, supra, at 556, it is questioned whether this Court intended the political process to be the exclusive or final guarantee of state sovereignty. For if that were the intention, then Garcia would deny in federalism cases the judicial review established by this Court in Marbury v Madison.

CONCLUSION

For the reasons noted in this brief, this case raises important questions of federal constitutional law. It is urged that the Court grant certiorari of this important case.

Respectfully submitted,

FRANK J. KELLEY
Attorney General of the
State of Michigan

Gay Secor Hardy
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

A. Michael Leffler
Charles C. Schettler, Jr.
Assistant Attorneys General

Attorneys for Amicus
State of Michigan